NO. 89-327 (2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

WILLIS LUCAS, ET AL.,
Petitioners

v.

LLOYD'S LEASING LTD., CAMMELL LAIRD SHIPBUILDERS, LTD. AND ALVENUS SHIPPING CO. LTD.,
Respondents

v.

CONOCO, INC.,
Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

Simply put, two grounds for certiorari are presented in the Petition. First, whether the decision below conflicts with this Court's opinions in *Kennedy v. Silas Mason,* 334 U.S. 249 (1948); *Anderson v. Liberty Lobby,* 477 U.S. 242 (1986); and *Arenas v. United States,* 322 U.S. 419 (1944). Second, whether the United States Court of Appeals for the Fifth Circuit's decision conflicts with *Union Oil Company v. Oppen,* 501 F.2d 558 (9th Cir. 1974) and with other Fifth Circuit decisions. For the reasons stated below, it is clear that both of these questions should be answered in the negative, and the Petition for a Discretionary Writ of Certiorari should be denied since no important or special issues are presented.

RULE 28.1 LIST OF PARTIES

In addition to the Petitioners, the following companies are listed in compliance with this Court's Rule 28.1:

Alva Shipping (Holding) Ltd., U.K.

Alvenus Shipping Company Ltd.

Lloyd's Leasing Ltd.

Lloyd's Banking Group, P.L.C.

Cammell Laird Shipbuilders, Ltd.

Vickers Ship Building & Engineering Ltd.

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To The Honorable Justices Of The Supreme Court of The United States:

Lloyd's Leasing Ltd., Cammell Laird Shipbuilders, Ltd. and Alvenus Shipping Co., Ltd., Respondents in this appeal, file this Brief in Opposition to the Petition for Writ of Certiorari filed by Willis Lucas, et al., and show as follows:

OPINIONS BELOW

The United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") properly affirmed a judgment of the United States District Court for the Southern District of Texas, Galveston Division, granting Summary Judgment in favor of Respondents since the alleged harm suffered by the Petitioners was not foreseeable. The Petitioners seek review of the Fifth Circuit's judgment. The Fifth Circuit Opinion is reported at 868 F.2d 1447 and the January 22, 1988, Memorandum and Order of the District Court is reported at 697 F. Supp. 289. Copies of both Opinions are attached as Exhibits "A" and "C", respectively, to the Petition for Writ of Certiorari. The Fifth Circuit properly denied a Motion for Rehearing and Motion for Rehearing *En Banc* on May 19, 1989, and the Petition for Writ of Certiorari ensued.

JURISDICTION

Jurisdiction of this Court has been properly invoked by Petitioners pursuant to 28 U.S.C. § 1254(1).

COUNTER-STATEMENT OF THE CASE

A. Statement of Facts

On July 30, 1984, the M/V ALVENUS grounded in the Calcasieu River Bar Channel approximately eleven nautical miles south-southeast of Cameron, Louisiana. As a result of the grounding, approximately 65,500 barrels of crude oil spilled into the waters of the Gulf of Mexico. Despite prompt containment measures the vagaries of the wind and current drove the slick over 70 miles west from the site of the grounding, and three to four days later, between August 3 and 4, 1984, the

rough seas and winds forced oil onto beaches at the west end of Galveston Island. Crews employed by Respondents herein immediately commenced cleaning oil from the beaches. During the next two weeks more oil was washed ashore.

Despite prompt and thorough cleaning of the area, a short-term general economic dislocation resulted from the oil spill. Petitioners are a discrete class of claimants who suffered minimal physical damage as a result of the spill. Petitioners are homeowners and commercial property owners situated at varying distances from Galveston Island beaches. Their physical damage resulted from oil being tracked by unknown third parties onto Petitioners' property and *not* by direct physical impact of the oil.

B. Course of proceedings and disposition in the two Courts below

This action was commenced by the filing of a Petition For Limitation of Liability pursuant to 46 U.S.C. § 180 *et seq.* Petitioners (Respondents herein) filed a Motion For Summary Judgment and on January 22, 1988, the district court ruled that those claimants who suffered economic loss exclusive of physical damage were precluded from seeking recovery of their economic damages. The district court ruled that those claimants alleging "tracking" damages and resulting economic losses were barred from recovery by traditional tort principles, as applied in admiralty, because the alleged physical damages, and the resulting economic damages, were not foreseeable as a matter of law.[1] This latter issue is the only issue which is before this Court.

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1. 697 F. Supp. at 291.

The order of the district court was appealed to the Fifth Circuit and on April 4, 1989, the Fifth Circuit affirmed the judgment of the district court.[2] The Court of Appeals clearly set out the issues before it. The issues were whether foreseeability is a quetsion of fact and should be decided as a matter of law and, second, whether Summary Judgment is appropriate. The Court of Appeals correctly held that Summary Judgment is appropriate under the circumstances of this case, correctly applied this Court's recent holdings with respect to summary judgment, and, based on the unique facts of this case, held damages suffered by Petitioners herein were unforeseeable as a matter of law.

ARGUMENT

Petitioners ask this Court to grant the Writ of Certiorari due to a purported conflict with prior decisions of this Court or a purported conflict between the Courts of Appeals. Furthermore, Petitioners make numerous "policy" arguments that the district court and the Fifth Circuit made improper factual findings. The latter arguments clearly are not a basis for the granting of a Writ of Certiorari under the time honored two-court rule[3] and because these issues were properly resolved below. As further elaborated below, Petitioners have failed to

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2. In their Petition For Writ of Certiorari, Petitioners incorrectly state that the Fifth Circuit reversed the trial court's holding but affirmed summary judgment. A reading of the Fifth Circuit and district court's opinions indicates that the district court's holding that the "tracking" damages were unforeseeable was affirmed by the Fifth Circuit.

3. *See, e.g., Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310, 317-8 n.5 (1985); *National Collegate Athletic Association v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 98 n.15 (1984).

satisfy the requirements for review on certiorari and no extraordinary policy reasons exist in the circumstances of this case for the granting of the Writ by this Court.[4]

A. There is no conflict with the decisions of this Court.

Petitioners contend that the decision of the Fifth Circuit conflicts with this Court's Opinion in *Kennedy v. Silas Mason Co.*, 334 U.S. 249 (1948); *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986); and *Arenas v. United States*, 322 U.S. 419 (1944). This is far from the case and, as discussed below, the opinion below does not conflict with this Court's decisions.

Petitioners cite *Kennedy v. Silas Mason Co.*, for the proposition that complicated cases involving profound public issues merit special treatment and since the case at bar is complicated, Summary Judgment was improper.[5] *Kennedy* involved a wartime action brought under the Fair Labor Standards Act by workers in an ammunition plant for overtime pay. This Court noted that "we have

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4. Petitioners make an argument that grave public policy considerations are involved in this case. This is far from the case since, as elaborated in the counter statement of the case, *supra*, this case involves alleged damage from a routine oil spill. Certainly, grave political or social questions are not involved in this case which might prompt this Court to grant a Writ of Certiorari. *See, e.g., Dames & Moore v. Regan*, 453 U.S. 654 (1981) (prompt disposition of claims brought by U.S. citizens against government of Iran); *United States v. Nixon*, 418 U.S. 683, 686-7 (1974) (review before judgment granted "because of the public importance of issues presented and need for their prompt resolution."); *United States v. United Mine Workers of America*, 330 U.S. 258 (1947) (validity of contempt adjudications growing out of government seizure of coal mines).

5. This Court has found Summary Judgment proper in extraordinarily complex cases. *See, e.g., Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

an extremely important question, probably affecting all cost-plus-fixed-fee war contractors and many of their employees . . . and ultimately affecting by a vast sum the cost of fighting the war."[6] In *Kennedy,* this Court noted that affidavits and attached exhibits alone provided an insufficient record on which Summary Judgment may be granted, but held that the district court did not lack the power or justification for applying Summary Judgment procedures. This Court overruled *Kennedy, sub silentio,* in *Celotex Corp. v. Catrett,*[7] and by the 1963 amendments to Rule 56(e) of the Federal Rules of Civil Procedure.

As this Court noted in *Celotex,* the plain language of Rule 56(c) mandates the entry of Summary Judgment, after adequate time for discovery, and upon Motion, against a party that fails to make a showing sufficient to establish the existence of an element essential to that party's cause of action, and on which the party will bear the burden of proof at trial.[8] Where the non-moving party bears the burden of proof at trial, Summary Judgment may be made solely on the pleadings, depositions, interrogatory answers and admissions on file.[9] Rule 56 requires the non-moving party to go beyond the pleadings and his own affidavits to designate specific facts showing genuine issues for trial.[10] Claimants have failed to estab-

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6. 334 U.S. at 256.

7. 477 U.S. 317 (1986).

8. 477 U.S. at 323-24.

9. 477 U.S. at 324.

10. *Id.* Thus, the courts below properly held that the affidavit in question was insufficient to overcome the Motion for Summary Judgment filed by respondents herein.

lish the existence of an essential element on which they bear the burden of proof, the foreseeability of harm, and the Fifth Circuit was correct in applying this Court's Summary Judgment standard.[11]

This Court held in *Anderson v. Liberty Lobby* that Rule 56(c) requires that the district court enter Summary Judgment if the evidence favoring the non-moving party is not sufficient for the jury to enter a verdict in his favor.[12] And, when the moving party has carried his burden under Rule 56(c) his opponent must present more than a metaphysical doubt about the material facts.[13]

This Court's standard was properly followed by the Fifth Circuit. Petitioners had the burden of proof to show that the harm they suffered was foreseeable.[14] Petitioners failed to establish the existence of this essential element of their case and, as this Court has noted, a complete failure of proof on an essential element renders all other facts immaterial because there is no longer a genuine issue of material fact.[15] Respondents recognize that this

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11. Petitioners contention that *Arizona Copper Co. v. Gillespie*, 230 U.S. 46 (1913) is to the contrary is incorrect. *Gillespie* was an appeal from the Supreme Court of the Territory of Arizona. Justice Lurton only held that a downstream riparian owner could obtain an injunction to enjoin pollution of a public stream. The question of foreseeability of harm was not the issue before this Court. Also, upstream pollution in a river causing damage is clearly more foreseeable than oil washing ashore 70 miles from a spill in the Gulf of Mexico and then being tracked by unknown third-parties on to Petitioners' property. Also, Petitioners are not riparian owners of the Gulf of Mexico.

12. 477 U.S. 242, 250 (1986).

13. *Matsushita Electric Industrial Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

14. As this Court noted in *Dalehite v. United States*, 346 U.S. 15, 42 (1953), a danger must be probable, not merely possible.

15. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

Court suggests lower courts act with caution in granting Summary Judgment and deny Summary Judgment where the better course is to proceed to a full trial.[16] However, in the case before the Court, proceeding to a full trial would be futile since Petitioner's have failed to designate specific facts to overcome a directed verdict or Summary Judgment and the courts below have exercised the requisite caution.[17] Thus, since the courts below properly followed this Court's mandate in *Celotex* and *Anderson v. Liberty Lobby,* no conflict with these opinions exists and the Petition for a Writ of Certiorari should be denied.

Petitioners also argue that the decision below conflicts with this Court's holding in *Arenas v. United States.*[18] That case has absolutely no application to the case currently before the Court. In *Arenas* an Indian sued to be awarded a trust patent to certain lands on an Indian reservation. The *Arenas* district court had granted Summary Judgment dismissing the suit and the district court was affirmed by the Court of Appeals for the Ninth Circuit. This Court reversed a finding that the Petitioner (Mr. Arenas, the Plaintiff below) properly stated a claim upon which relief can be granted and that he was entitled to a trial. Petitioners in the case currently before this Court deceptively cite *Arenas* without noting that the issue regarding whether proper Summary Judgment evidence was adduced was not even presented to this Court in *Arenas.*[19]

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16. *Anderson v. Liberty Lobby,* 477 U.S. 242, 255 (1986), *citing, Kennedy v. Silas Mason Co.,* 334 U.S. 249 (1948).

17. The Summary Judgment standard mirrors the directed verdict standard. *Anderson,* 477 U.S. at 250.

18. 322 U.S. 419 (1944).

19. The issue was not raised below. *See* 137 F.2d 199 (9th Cir. 1943). Petitioners cite *Arenas* for the proposition that a complex

The decision below does not conflict with the standard for granting Summary Judgments in prior opinions of this Court. The Petition for a Writ of Certiorari should be denied.

B. The decision of the Fifth Circuit is not contrary to decisions rendered by other circuit courts.

Contrary to Petitioners' contentions, the Fifth Circuit's decision in this case does not conflict with the Court of Appeals for the Ninth Circuit's opinion in *Union Oil Co. v. Oppen.*[20]

The issues determined by the Fifth Circuit were whether foreseeability is properly decided on a Motion for Summary Judgment and whether the alleged damage suffered by Petitioner falls within the Fifth Circuit's definition of foreseeability.[21] The issue below is not whether parties can recover for economic losses absent physical injury to a proprietary interest.[22]

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case can be disposed of only by trial. This proposition was rejected by this Court in *Celotex* where it was held that irrespective of the complexity of a case Summary Judgment is mandated by Federal Rule of Civil Procedure 56(c) where a party fails to establish the existence of an element essential to his case on which he bears the burden of proof. 477 U.S. at 322-23. Respondents also note that this Court found Summary Judgments are proper in complex cases. *See, e.g., Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

20. 501 F.2d 558 (9th Cir. 1974).

21. 868 F.2d at 1449.

22. The issue was decided by the Fifth Circuit in *State of Louisiana Ex rel. Guste v. M/V TESTBANK*, 752 F.2d 1019 (5th Cir. 1985) (*en banc*), *cert. denied*, 477 U.S. 903 (1986). In that case, the Court of Appeals properly followed the direction of this Court in *Robins Drydock & Repair Co. v. Flint*, 275 U.S. 303 (1927). The issue regarding whether *Robins Drydock* was properly decided is not before this Court today. Also, an arguable conflict

Union Oil Co. v. Oppen does not conflict with the decision below. *Union Oil* dealt with a claim by fishermen for damages sustained as a result of the 1969 Santa Barbara oil spill. The Court of Appeals for the Ninth Circuit, in affirming the district court's denial of defendants' motion for partial summary judgment, held that under California or maritime law[23] fishermen were allowed to recover for pure economic loss. Thus, the issue before the *Oppen* court was not foreseeability of damage as a result of an oil spill but was whether a special exception should be made for commercial fishermen to the general rule that no cause of action lies against a defendant whose negligence prevents the Plaintiff from obtaining a prospective pecuniary advantage.[24] The Court of Appeals for the Ninth Circuit held that commercial fishermen may recover their economic losses caused by the oil spill of January 28, 1969.[25] Therefore, since the issues in the case currently

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between the Courts of Appeals regarding the now well established rule in the Fifth Circuit that prohibits recovery for economic loss absent physical injury to property in which Plaintiff holds a proprietary interest is not an issue in the case currently before this Court because it played no part in the *per curiam* decision of the Fifth Circuit in its Opinion below.

23. *Union Oil v. Oppen* arose as a claim under the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 *et seq.* Pursuant to that statute state law is adopted as surrogate federal law. *See* 43 U.S.C. § 1333(a)(2).

24. The court found an exception in this particular case holding that a special relationship between commercial fishermen and oil companies appears to exist. *See* 501 F.2d at 565-571.

25. The court also notes that "nothing said in this Opinion is intended to suggest, for example, that every decline in the general commercial activity of every business in the Santa Barbara area following the occurrence of 1969 constitutes a legally cognizable injury for which Defendants may be responsible." 501 F.2d at 570. Thus, Petitioners in the case currently before the Court would not even be allowed to recover, as a matter of law, under *Oppen*. No

before this Court, whether the Fifth Circuit properly decided a question of foreseeability by Motions for Summary Judgment, was not even presented to the court in *Oppen* no conflict exists.[26]

It also should be noted that the Court of Appeals for the Ninth Circuit, in decisions with respect to the foreseeability issue presented below, is in absolute agreement with the Court of Appeals for the Fifth Circuit as well as other Courts of Appeals.[27] In other words, there is no

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conflict between the Courts of Appeals exists since under either scenario—foreseeability or California law regarding recovery for pure economic harm—Claimants would be denied recovery.

26. The court in *Oppen* does note that the presence of duty on the part of defendants (the oil company) would turn substantially on foreseeability and that a question for the trial court was whether defendants could reasonably have foreseen that negligently conducted drilling operations might diminish business opportunities of commercial fishermen. 501 F.2d at 569. Diminishment of aquatic life could be a foreseeable consequence of a substantial oil spill. The Court of Appeals for the Ninth Circuit is merely restating generally accepted tort principles. *See, e.g., Morris on Torts,* p. 44 (2d Ed.).

These facts are clearly distinguishable from the case currently before this Court since the damage which Petitioners claim was foreseeable here is whether people walking on a beach damaged by an oil spill would get oil residue on their shoes, walk into Petitioners' homes and businesses and because these people with oil on their shoes were not careful, certain small amounts of oil were tracked onto the carpet or floor of Petitioners. It must be noted that Petitioners in this case are not the owners of the beach or owners of property that suffered direct harm as a result of the oil spill. Rather, these are persons who suffered harm as the result of third-parties who tracked oil onto their property. As the district court properly pointed out, the element of third-party intervention from the beaches to claimants businesses and condominiums broke the chain of foreseeability. 697 F. Supp. at 291. The claimants in this case are not commercial fishermen who claimed a diminishment in shrimp or fish business as the result of the oil spill.

27. *See, e.g., Weyerhaeuser Co. v. Atropos Island,* 777 F.2d 1344, 1351-2 (9th Cir. 1985) (Defendant should not be liable for damages that bear only a tenuous causal relation to Defendant's negligence, therefore, based on the facts in the case harm was deemed unfore-

conflict between the Courts of Appeals regarding the issue before the Court today.[28]

Finally, Petitioners argue that because the decision below is in conflict with prior holdings of the United States Court of Appeals for the Fifth Circuit, a Writ of Certiorari should be granted. A Writ of Certiorari is not proper to resolve a difference between two panels of the same Court of Appeals. Rehearing *En Banc* is the proper remedy. Rehearing *En Banc* was properly denied in this case because there is no conflict between the decision below and prior decisions of the United States Court of Appeals for the Fifth Circuit with respect to the summary judgment on foreseeability.[29]

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seeable). *See also, Alaska Freight Lines v. Harry,* 220 F.2d 272 (9th Cir. 1955) (under California law, foreseeability essential element of negligence action). Likewise, both this Court and the Courts of Appeals have found that for a Defendant to be liable shipowner must reasonably have foreseen harm done. *Dalehite v. United States,* 346 U.S. 15, 432 (1953) (danger must be probable, not merely possible); *Consolidated Aluminum Corporation v. C.F. Bean Corporation,* 833 F.2d 65 (5th Cir. 1987), *cert. denied,* 108 S. Ct. 2821 (1988); *Republic of France v. United States,* 290 F.2d 395 (5th Cir. 1961), *cert. denied,* 369 U.S. 804 (1962); *Petition of Kinsman Transit Company* (*Kinsman I*) 338 F.2d 708 (2nd Cir. 1964), *cert. denied,* 380 U.S. 904 (1965).

28. Likewise there is no conflict with the Court of Appeals for the Seventh Circuit's suggestion that admiralty courts should be less ready to find a subsequent wrongful act by a party who breaches the chain of causation. *Commercial Transport Corp. v. Martin Oil Service, Inc.,* 374 F.2d 813, 817 (7th Cir. 1967), *citing,* Gilmore and Black, *The Law of Admiralty* (1957), p. 404. In *Martin Oil,* the court was referring to the fact that contributory negligence was not a bar to recovery in an admiralty action while in 1967 it was a bar to recovery in shore courts. Thus, admiralty courts were less reluctant to find contributory negligence. This is not the situation in the case before this Court today.

29. In fact, the Fifth Circuit has held that summary judgment is proper on the question of foreseeability in a negligence cause of action. *Karpovs v. State of Mississippi,* 663 F.2d 640, 649 (5th Cir.

C. No constitutional question is presented.

The opinion below does not find that any statute of the United States is unconstitutional and Petitioners do not make such an allegation. Therefore, the third general reason for granting a Writ of Certiorari is not present in the case before the Court.

CONCLUSION

The case before the Court does not present special and important matters for certiorari. As noted above, the granting of Summary Judgment was properly resolved by the Court of Appeals in accord with this Court's recent triumvirate of cases dealing with summary judgment.[30] There is no conflict between the Courts of Appeals either on the question of whether summary judgment is proper or regarding the proper standard for determining fore-

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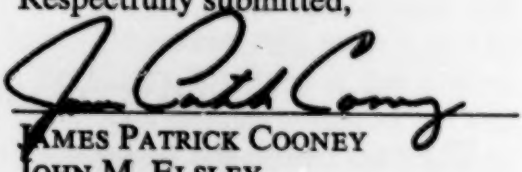
1981). Furthermore, Petitioners contend that the decision below conflicts with the doctrine of foreseeability as applied in *State of Louisiana Guste v. M/V TESTBANK*, 752 F.2d 1019 (5th Cir. 1986) (*en banc*). It doesn't because the issue before the Court in *TESTBANK* was whether physical damage was required to recover for economic injury and not whether summary judgment was proper on the question of foreseeability. Likewise, the issue before the court in *Consolidated Aluminum Corporation v. C.F. Bean Corporation*, 833 F.2d 65 (5th Cir. 1987), *cert. denied*, 108 S. Ct. 2821 (1988) was whether the trial court's ruling was proper in a bench trial that damages suffered by Consolidated were not foreseeable. The Fifth Circuit held that the Court properly determined that damages suffered were not foreseeable and not within the reach of duty imposed on Bean to perform its dredging operations. *Id.* at 68. There is no conflict between the decision below and other Fifth Circuit cases.

30. *Matsushita Electric Industrial Company Ltd. v. Zenith Radio Corporation*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corporation v. Catrett*, 477 U.S. 317 (1986).

seeability in a maritime limitation of liability case. Finally, no constitutional question is presented.[31] Accordingly, Respondents respectfully submit that the Discretionary Petition For Writ of Certiorari must be denied.

Respectfully submitted,

By: 

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31. There is also no great public policy issue in this case. As noted in footnote 4 *supra*, Petitioners apparently wish this Court to grant a Writ of Certiorari to re-examine the facts in this case.

CERTIFICATE OF SERVICE

I hereby certify that I have served three copies of the foregoing Opposition To Petition For Writ of Certiorari on the following named counsel by placing the same in the United States mail, *Certified Mail, Return Receipt Requested*, in a properly addressed package with adequate postage this 17 day of October 1989:

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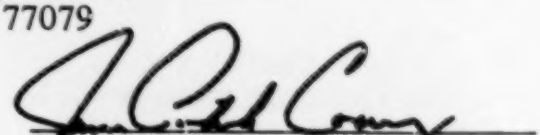

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